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MARITIME LIENS.

THE recent decision of the Supreme Court of the United States in the case of *The Lotawanna*, *ante*, p. 483, settled a question in admiralty law which had been in doubt and in controversy among a whole generation of American lawyers. The principal point decided was, that no lien is given, by the maritime law of the United States, for repairs or supplies furnished to a vessel in her home port. This was the substance of the previous decision by the same court in 1819, in the case of *The General Smith*, 4 Wheaton 438, but the changes in the opinions of admiralty lawyers and judges even of the highest courts since that date, (see *Taylor* v. *Steamboat Commonwealth*, *ante*, p. 86), the vast and increasing importance of the question since the development of the commerce upon the great lakes of this country, and the fact that the rule laid down differed from the rule well established among many of the principal commercial nations of the world, had led to the impression in many quarters that when the question again arose the Supreme Court would overrule *The General Smith* and establish the contrary rule. Under this impression some of the District Courts, more or less elaborately distinguishing *The General Smith* from the cases in hand, had decided that a lien existed by the maritime law for supplies furnished on the credit of a vessel, even in her home port. In *The Lotawanna*, however, the Supreme Court, referring to *The General Smith* as a case in point which had never been departed from, formally reaffirmed it, and authoritatively declared that by the maritime law of the United States no such lien exists.

Of course this decision, contrary to the wishes as well as the expectations of many admiralty lawyers, has not escaped hostile criticism, especially in view of the elaborate dissent of Judges CLIFFORD and FIELD.

It is contended frankly by some, that *The General Smith* being wrongly decided, ought to have been overruled, while others, less willing perhaps to see the highest tribunal in the land sacrifice an established precedent, have contended with earnestness and ingenuity that *The General Smith* was not in point, and that the real decision in that case was not that no such lien is implied by the maritime law, but that whether a lien exists or not is a question not of maritime but of municipal (or as one critic rather questionably calls it, *terrene*) law.

The question we take to be no longer open to argument. The highest tribunal having jurisdiction over it has put it authoritatively and finally at rest, but it may be useful to review briefly and in a general way the objections that have been made to the decision.

With due submission, we think that the court was right in holding that the decision in the case of *The General Smith* was directly to the effect that, in the case supposed, no lien is implied by the general maritime law as recognised in this country. The ship belonged in Baltimore, where her owner resided, and where the supplies were furnished. A libel *in rem* was filed for the amount, and the Supreme Court decided that it would not lie, because no lien was implied. The libellants contended that the general maritime law gives a lien in all cases of necessaries furnished to a ship without regard to the domicile of the owner. This was controverted by the claimants, who insisted that the local or municipal law controlled the question, and as in Maryland this was the common law, no lien existed, and the District Court had no jurisdiction of the case. Mr. Justice STORY delivered the opinion. He said the court entertained no doubt, that admiralty rightfully possessed a general jurisdiction in cases of material-men, and that if this had been a proceeding *in personam* the jurisdiction of the court would have been sustained; but that, being a proceeding *in rem* to enforce a specific lien, the lien must be shown to exist; that in the case of a foreign ship, or a ship in the port of a state to which she does not belong, the general maritime law, following the civil law, gives such a lien; but that in respect to necessaries furnished in

the port or state to which the ship belongs, the case is governed altogether by the municipal law of the state, and no lien is implied unless it is recognised by that law; and that as the common law was the municipal law of Maryland, and gave no such lien, none existed in the case. The opinion concludes, "We are of opinion that here there was not, by the principles of law, any lien upon the ship."

Here, the point was distinctly made by the libellants, that a lien was implied by the general maritime law. The court as distinctly decided the contrary, and held that the case was to be governed by the municipal law. If such was not the effect of the decision, it is difficult to know by what rule of hermeneutics it is to be construed. Of course, when either counsel or the court referred to the general maritime law, they referred to the maritime law as recognised and used in this country. If by that law the lien in question did exist the decision could not have been as it was. The decision disaffirmed its existence, and is necessarily a direct authority on the point. If the maritime law as received in our jurisprudence gave the lien, of necessity the municipal law could not affect it. On the other hand, if the question was one of municipal law which denied the lien, of like necessity, the maritime law could not affect the question and gave no lien, that is, the maritime law as recognised in our jurisprudence. The two propositions are directly the opposite of each other, and a decision in favor of one, necessarily involved the disaffirmance of the other.

The error of this criticism is, in supposing that the general maritime law has any force as law independently of the municipal law. The court in the case of *The Lotawanna* held (correctly, as we maintain) that it has only the force of law in any country so far as it is recognised and adopted therein, that is, by the municipal law of the country, consisting of its legislation, customs, usages and decisions; and that so far as there recognised and adopted it becomes the maritime law of that country. If the court was right in this proposition there can be no doubt that the case was rightly decided. The necessary effect of the decision in the case of *The General Smith* was, that by the maritime law as recognised and received in this country no such lien existed.

The real question, then, to which attention should be directed is, has the general maritime law any force further than as it is recognised and received as law by the municipal laws of the country,

that is, by its legislation, customs, usages and decisions? The Supreme Court decides in the case of *The Lotawanna*, that it has not. Is any lawyer prepared to assert the contrary? Is he prepared to lay it down as the duty of our courts to import into our law the whole system of rules to be found in the foreign books on maritime law, without regard to what has been used and approved, and what rejected or never used in our jurisprudence? We are aware that such is the view of many high-admiralty men, who have fallen in love with these institutes; but we are at a loss to understand when and where it was that this entire mass of law was enacted and made law for the people of this country.

The truth is, that whilst in many, nay, in most matters of a maritime character, one general law, called the maritime law, is used by all commercial nations, each makes such modifications in matters of detail, and especially in matters merely local, affecting only its own people, as it deems expedient and consonant to its own institutions and usages. No two nations adopt precisely the same system of maritime law. Every nation is free to adopt its own code. We should regard it as an indignity if France should insist upon imposing upon us her entire Code du Commerce, however excellent that code may be. Still, as a matter of public convenience and utility, it is essential that every commercial nation should adopt all the principal features and rules of the general maritime law. But how far it shall do so, is, after all, a matter for its own discretion. The assertion of this principle is the great feature of the opinion in the case of *The Lotawanna*. We submit that it is a sound and incontrovertible principle.

This conceded, it follows, of course, that judicial decisions furnish an authoritative source, and those of the Supreme Court of the United States the most authoritative, for information as to the extent to which the general maritime law is recognised, and as to what modifications any of its rules have undergone, in the jurisprudence of this country; and the case of *The General Smith* is a leading and controlling authority upon the special point decided in *The Lotawanna*.

Whether the case of *The General Smith* was rightly decided, or whether it ought not to have been overruled, is another matter. On this point a few observations may be pertinent.

In the first place, it is hardly necessary to say that by the law of England, from whence our own laws are derived, no such lien as

that in question is allowed. It is immaterial whether we say it is disallowed by the common or the statute law, or by the maritime law as recognised by these laws. If the contract is a maritime one (which is generally conceded) it would be more proper to say that its incidents belong to the law maritime, whether proceeding from legislative or customary authority, or from a system used by all commercial nations. It is not the origin of a law that makes it maritime, but the nature of the subject to which it is applied. It may be municipal law in the sense of being the proper law of a particular country, and yet maritime, because the subject is maritime. Municipal law extends to all the proper and peculiar law of a single people. Therefore, whilst it is true that the municipal law of England withholds a lien in the case of necessaries supplied to a vessel in her home port, it is no less true that the maritime law of England does the same, and for the very good reason that in this respect it is controlled by and follows the municipal law.

And there is no good ground for supposing that the law of this country is different except where it may have been changed by statute. When the state courts of admiralty, before the adoption of the Constitution, administered the lien in question, it was not by virtue of the general maritime law, but by virtue of statutes passed at a time when the states had plenary power over the subject. By such statutes the right to the lien became a part of their maritime law, just as in England at the present day, accessions are constantly made to the maritime law by Acts of Parliament. Thus it happened that, when the Constitution was adopted, and the District Courts were established with admiralty jurisdiction, they found the lien given in some states, and not given in others, and they administered the law as they found it. But as the statutes of the states did not become by their own force laws of the United States, the lien never became incorporated into the general maritime law of the whole country. It was administered by the District Courts as local law in the states where it prevailed, operative so long as Congress adopted no general legislation on the subject.

This is the true history of the question, and the decision in the case of *The General Smith* was in accordance with it. The court in that case truly said, "In respect to repairs and necessaries in the port or state to which the ship belongs, the case is governed altogether by the municipal law of that state, and no lien is im-

plied unless it is recognised by that law." And the reason is obvious; because, there existed no general maritime rule on the subject in the United States. The general maritime law, as recognised in this country, furnished no lien in the case, but was silent in the presence of the various municipal laws. Had the court in the case of *The Lotawanna* decided differently it would have been simply judicial legislation.

That Congress is competent to intervene, and make a uniform law on the subject, hardly admits of a doubt. As stated by the Supreme Court, the act to regulate the recording of mortgages on ships and vessels, passed in 1850, and that limiting the liability of shipowners, passed in 1851, relate to subjects no more closely connected with maritime commerce than is the contract to furnish repairs and supplies; and both of these acts have been sustained by the Supreme Court: *White's Bank* v. *Smith*, 7 Wall. 655; *Ins. Co.* v. *Dunham*, 11 Wall. 21. Congress has assumed without question the whole subject of regulations concerning the building, equipment, ownership and hypothecation of ships and vessels invested with national character. It is undoubtedly desirable that it should also legislate on the question of lien for supplies furnished to ships in their home ports. The law on this subject ought to be uniform, and a part of the general maritime law of the country. As such it would supersede and displace the local laws, as has been done in the case of pilotage.

It may be remarked, however, in passing, that the English and American law, in denying the lien in question, violated no recognised principle of the general maritime law. It is conceded that a lien is not implied in all cases even of supplies furnished to a foreign vessel. It is only when they are necessary, and when credit is given to the ship. Now it may have been argued as a legal inference, a *præsumptio juris*, that supplies furnished to a vessel in her home port, where she cannot be in distress, where she is under no exigency of completing her voyage and getting home, where she is under the eye and care of her owner, are not necessaries in any legal sense, and are furnished on the credit of the owner himself and not on that of the ship. This view of the subject reconciles the denial of the lien with the general principles of the maritime law, though a different rule prevails in foreign tribunals, taking a different view of the facts.

Perhaps the most serious question discussed in the case of *The*

Lotawanna was, whether the states or the United States are the conservators of maritime law; and we think that the true ground was assumed, in declaring that the maritime law of this country is national and not sectional; and that as a general thing, any alteration or amendment of it must be sought at the hands of the national and not the state legislatures. The regulation of foreign and interstate commerce was vested in the Congress of the United States; and maritime law and admiralty jurisdiction are so closely allied to these subjects that it followed as a necessary corollary that the Constitution should declare (as it did) that the judicial power should "extend to all cases of admiralty and maritime jurisdiction." It also follows, by necessary implication, that the law to be administered by the courts invested with this jurisdiction, must be subject to the paramount supervision of the national legislature. Of course the existing law as it was found to prevail in the states in 1789, when the Constitution was adopted, would stand until altered by Act of Congress. This would be the general rule. Still, in matters local, as in certain like matters connected with exterior commerce (pilotage, for example), regulations made by the states would be permitted to have effect in the absence of congressional regulation.

It might have seemed to some strict constructionists, perhaps, that as the power to legislate on the subject of maritime law was not expressly given to Congress, it was reserved to the states. But as such a reserved power would have greatly interfered with and impaired the power to regulate external and interstate commerce, and as the jurisdiction over all maritime cases was vested in the Federal judiciary, it seems to be a necessary implication that the maritime law of the country was intended to be subject to the supervision of Federal as opposed to state legislation.

The court very pertinently says: "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. * * * The Constitution must have referred to a system of law co-extensive with, and operating uniformly in, the whole country. It certainly could not have been the intention

to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other, or with foreign states."

But to contend that in extending the judicial power of the General Government to all cases of admiralty and maritime jurisdiction, the Constitution intended to import into our judicial system, and to establish as law, the whole body of maritime law acknowledged by European countries, irrespective of the qualifications with which it had been received and used in the jurisprudence of this country, seems to us the height of absurdity. If such had been the understanding of our ancestors, it would have furnished a very weighty objection to the adoption of the Constitution itself. No one can examine any of the standard treatises or codes of maritime law without having his attention arrested by many subjects which are entirely unknown to the maritime law as we understand and use it. It often consists of ordinances made for the regulation of naval as well as commercial subjects, or only adapted to limited localities. Take, for example, the Ordinance of Louis XIV., made in 1681, which is often referred to as being one of the best institutes of maritime law. Did our ancestors suppose that they were adopting for the United States the whole substance of this statute (for it was nothing else) when they conferred the admiralty jurisdiction upon the Federal courts?

There is a great deal of good maritime law in the Ordinance of 1681, and also in the later as well as older ordinances and codes of France and other countries; and the principles of the law are beautifully and clearly set forth in the many treatises that have been written; but all these are to be used with judgment and discretion, and with a careful reference to what has been decided as good law in England and this country—two nations of quite as much consequence in the commercial and maritime world as ever Genoa or Venice were, or France, Italy or Spain. We do not underrate the necessity or the great benefit to be derived from the careful study of the maritime law; but we protest against its being thrust upon us in the mass without a due regard to the eclectic process by which the judicial lights of the Anglo-Saxon world have retained what is good and rejected what is bad or unsuitable to our condition. We know that it is fashionable among a certain

class of lawyers, embracing especially those who have some pretensions to scholarship, to affect a peculiar reverence for the civil law, and those special systems which have sprung from, or are founded upon it; and those who have made the maritime law and admiralty practice a specialty, naturally become enamored of the system to which they have devoted their studies; and not unfrequently manifest irritability and impatience if its authority is questioned or if it is more restricted in its application in this than in some other commercial countries.

We confess a sympathy with this feeling to a certain extent. We like the maritime law and are fond of studying its authorities. We think it embodies juridical principles most just and rational; and are glad to see it observed and applied in all cases where it can be without violating long-established rules of property and the received law of the land. But these we feel bound to observe at all hazards, until they are amended by valid legislation, or modified by the silent operation of changed circumstances and conditions. Whilst always fully alive to the progressive principle founded on the maxims, *cessante ratione cessat et ipsa lex*, and *ratio est vita juris*, we deprecate that wild love of theory which would cut loose from all respect for precedent and authority, and introduce entire new systems of jurisprudence unknown to our predecessors and to ourselves except as subjects of curious reading and research for the purpose of aiding our knowledge of comparative jurisprudence.

Let maritime law be profoundly studied; let its benign principles be faithfully applied to all the cases which our own laws permit and allow to be done; and if it is desirable to apply them still farther, and to modify and amend our own jurisprudence, let it be done in an orderly manner and by that department of the government to which it appertains to make and amend the laws.

RECENT AMERICAN DECISIONS.

Supreme Court of Errors of Connecticut.

MERRIT MERWIN AND OTHERS *v.* EZRA WHEELER.

A strip of sandy beach, mainly valuable for its sand as an article of merchandise, was owned in fee by the plaintiffs, and the defendant claimed a prescriptive right to take sand *ad libitum* therefrom. *Held*, that evidence that the defendant, as one of the public, and not as incident to an estate in other lands, had taken